89- 1377

Supreme Court, U.S.
FILED
FEB 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

ANN TROITINO JOHNSTON, PETITIONER

v.

STATE OF TEXAS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTEENTH COURT OF APPEALS OF TEXAS

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QUESTION PRESENTED

Whether a Texas court may require a criminal defendant to prove prejudice from constitutionally deficient assistance of counsel by a preponderance of the evidence, when this Court, in Strickland v. Washington, 466 U.S. 668 (1984), has specifically stated that relief shall be afforded on a lesser "reasonable probability" standard.

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No.

ANN TROITINO JOHNSTON, PETITIONER

v.

STATE OF TEXAS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTEENTH COURT OF APPEALS OF TEXAS

Ann Troitino Johnston respectfully petitions for a writ of certiorari to review the judgment of the Fourteenth Court of Appeals of Texas in this case.

OPINION BELOW

The opinion of the Fourteenth Court of Appeals (App., infra, 1a-11a) is unreported.

JURISDICTION

The judgment of the Fourteenth Court of Appeals was entered on June 15, 1989. The Texas Court of Criminal Appeals denied a petition for discretionary review on October 25, 1989, and denied rehearing on November 29, 1989 (App., infra, 14a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal proceedings, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

STATEMENT

This criminal case raises important issues concerning the standards for proving ineffective assistance of counsel under the Sixth Amendment to the United States Constitution. Petitioner was convicted of involuntary manslaughter by reason of driving while intoxicated. The evidence supporting the conviction was very slim. Specifically, although intoxication was the essential disputed issue at trial, there was no breathalyzer or other scientific evidence to indicate that petitioner was intoxicated. The sole prosecution evidence bearing on that issue was the lay opinion testimony of two persons who saw petitioner after the accident, and who had themselves been drinking -- lay opinion testimony that

was contradicted by other credible record evidence.

The State's thin case received considerable assistance, however, from errors committed by petitioner's own counsel. The effect of the errors was to present new evidence detrimental to petitioner, as well as to repeat the State's case. In these circumstances, the Texas Court of Appeals' application of the wrong standard of proof for ineffective assistance of counsel effectively sanctioned a breakdown of the adversary system and casts serious doubt on the reliability of the ultimate outcome. Moreover, the Texas Court of Appeals' misunderstanding of this Court's standard under Strickland v. Washington, 466 U.S. 668 (1984), has surfaced repeatedly in Texas cases since Strickland and calls for clarification and correction by this Court.

1. In the early hours of May 11, 1986, petitioner was driving her car when it collided with another car. 3 SF 46-47. */ Susan Scrace, a passenger in the other car, was seriously injured, as was petitioner. 3 SF 214-215, 241. Scrace ultimately died of her injuries. 3 SF 117. After the accident, two witnesses, Jayna Brandes and Melissa Adams, who had emerged from a nearby bar, observed the scene and talked to petitioner. Petitioner waited at the scene for police to arrive, but because of an error in dispatching the police did not arrive until an hour and fifteen minutes after the accident. 3 SF 12. By that time, petitioner (after leaving her address and

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*/ "SF" refers to the "Statement of Facts" in the trial court. In Texas, the "Statement of Facts" is the term used for the verbatim transcript of the proceedings.

telephone number with bystanders) had left with her sister to obtain treatment for her injuries. 4 SF 353. Thus, the record contains no medical tests for alcohol content in petitioner's breath or blood. App., infra, 2a-3a; 3 SF 137. Petitioner was indicted for involuntary manslaughter by reason of intoxication under Tex. Penal Code § 19.05(a)(2).

Intoxication is an essential element of involuntary manslaughter by reason of intoxication under Texas law, and the question whether petitioner was intoxicated at the time of the accident was the chief issue at trial. Since the State had no medical evidence of intoxication, its proof of this element was limited to the observations of witnesses Brandes and Adams after the accident. Petitioner presented expert testimony from a clinical neuropsychologist that the effects of

a head injury like the one petitioner received in the accident could mimic intoxication in such a way that a layperson could easily mistake those effects for drunkenness. In fact, the expert testified that it would be impossible for a layperson to know the difference. 3 SF 219-221. Another witness who observed petitioner minutes after the accident testified that petitioner appeared to be in shock and did not appear intoxicated. 4 SF 352.

Thus, the jury had substantial grounds to entertain reasonable doubts about the reliability of witnesses Brandes and Adams' perceptions. These doubts were strengthened by the brevity of the encounter, the lateness of the hour, the emotions surrounding the accident, and evidence that Brandes and Adams

themselves had been drinking throughout the evening. 3 SF 93, 149, 206-207.

The testimony of Brandes and Adams had brought out some of the observations that led them to conclude that petitioner was intoxicated. As part of the defense case, petitioner's counsel called Les Radford, a private investigator who had interviewed both witnesses. 3 SF 188-210. Radford testified about some minor discrepancies between Brandes and Adams' statements to him soon after the accident and their testimony at trial. Because Radford had been called, however, the prosecutor was afforded an opportunity to show on cross-examination that Brandes and Adams' statements soon after the accident mentioned the same specific observations of petitioner's actions and demeanor that came out in those witnesses' trial testimony. App., infra,

4a-6a; 3 SF 200-207, 209-210. Thus, the jury heard the same damaging observations twice, and the prosecution was able to show prior consistent statements of its own key witnesses without waiting for a challenge to consistency.

The negative impact of the Radford testimony was not limited to its use to bolster the State's case, however. Substantial new statements from Brandes and Adams were admitted through Radford's report. Without objection by defense counsel, the State elicited from Radford hearsay testimony to the effect that Brandes told Radford that she heard petitioner ask Adams to slap petitioner's face in order "to help her sober up" before the police arrived. 3 SF 200. The State also elicited similar hearsay testimony to the effect that petitioner had said that she wanted a cup of coffee

"to sober up." Ibid. Neither Adams nor Brandes had testified that petitioner said anything about "sober[ing] up." 3 SF 158, 167. There followed page after page of transcript in which the State elicited Radford's damaging repetitions of Brandes and Adams' opinions about petitioner's alleged intoxication. 3 SF 200-207. Not only was the new evidence thus admitted through the defense, but also there was no cross-examination to test the reliability of Brandes and Adams' supposed statements to Radford.

The jury, apparently choosing to believe Brandes and Adams' testimony, convicted petitioner of involuntary manslaughter. The trial court imposed the maximum sentence, ten years' imprisonment. See Tex. Penal Code § 12.34(a).

2. On appeal, petitioner argued that her defense attorneys, in calling

Radford, made the prosecution's case rather than her own and caused a breakdown in the adversary system, violating her Sixth Amendment right to the effective assistance of counsel. The Texas Court of Appeals agreed that the marginal impeachment value of Radford's direct testimony was outweighed by the support that Radford gave to the chief prosecution witnesses. App., infra, 7a-8a. Assuming that this error satisfied the deficiency prong of the Strickland test, the court of appeals nevertheless held that petitioner had not satisfied the prejudice prong of that test, finding "no basis for speculating that the jury would have returned a verdict of not guilty had defense counsel chosen not to try to impeach the witnesses' testimony." App., infra, 8a. This language from the court of appeals opinion derives from a series

of Texas cases holding that a defendant claiming ineffective assistance of counsel must prove his claim by a preponderance of the evidence.

Texas' highest criminal court denied discretionary review, and petitioner now seeks review in this Court.

REASONS FOR GRANTING THE PETITION

By placing on petitioner the burden of establishing prejudice from her counsel's deficient performance by a preponderance of the evidence, the Texas Court of Appeals erected an impermissible barrier to the vindication of petitioner's Sixth Amendment right. In the case establishing the test for ineffective counsel claims, Strickland v. Washington, 466 U.S. 668 (1984), this Court outlined two inquiries: deficiency of performance

and prejudice. The deficiency prong examines whether counsel's performance was so deficient as to fall outside the "wide range of reasonable professional assistance." 466 U.S. at 689. The prejudice prong examines whether counsel's errors "undermine confidence in the outcome." Id. at 694.

This Court carefully considered what standard of proof should apply in the prejudice inquiry. It rejected a "some conceivable effect" standard, because virtually every act of counsel that met the deficiency test would also meet such a lenient prejudice test. 466 U.S. at 693. On the opposite end of the scale, the Court also rejected a "more likely than not" standard such as the one used in motions for a new trial based on newly discovered evidence. This preponderance standard, the Court held, is appropriate

in motions for a new trial, because it assumes that the newly discovered evidence can be injected into an otherwise fair and reliable proceeding. Id. at 694. By contrast, an ineffective counsel claim throws doubt on the validity of the entire proceeding in which counsel appears, because the availability of adequate counsel is "one of the crucial assurances that the result of the proceeding is reliable." Ibid. Hence, a defendant ought to be able to obtain relief for counsel deficiencies "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Ibid.

The proper standard, this Court held, can be borrowed from the standard applied to claims that the prosecution withheld exculpatory material from the defense under United States v. Agurs, 427

U.S. 97, 104, 112-113 (1976), and its progeny. Strickland, 466 U.S. at 694. That standard is that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Ibid. In other words, there is "a probability sufficient to undermine confidence in the outcome." Ibid.

In the years since Strickland, this Court has reaffirmed its rejection of a preponderance standard in favor of the more easily satisfied "reasonable probability" standard for the prejudice prong of the ineffective counsel test. For example, in Nix v. Whiteside, 475 U.S. 157 (1986), which rejected an argument that effective counsel would have allowed his client to commit perjury, the Court observed that "a defendant need not establish that the attorney's deficient

performance more likely than not altered the outcome." 475 U.S. at 175. See also Hill v. Lockhart, 474 U.S. 52, 59 (1985) (applying Strickland to guilty plea proceedings, including the "reasonable probability" standard for prejudice). The lower federal courts have followed suit. See, e.g., Deutscher v. Whitley, 884 F.2d 1152, 1160 (9th Cir. 1989) (reversing the district court's denial of habeas corpus on an ineffective counsel claim), petition for cert. pending, No. 89-753; Martin v. McCotter, 796 F.2d 813, 817 (5th Cir. 1986), cert. denied, 479 U.S. 1057 (1987); McNeil v. Cuyler, 782 F.2d 443, 448-449 (3d Cir.), cert. denied, 479 U.S. 1010 (1986).

The Texas courts have acknowledged that they must follow Strickland in evaluating ineffective counsel claims, although they have expressed doubt as to

whether they are required to do so in non-capital sentencing. Hernandez v. State, 726 S.W.2d 53 (Tex. Crim. App. 1986); Ex parte Cruz, 739 S.W.2d 53, 58 (Tex. Crim. App. 1987) (earlier state-law standard applied to claim that counsel was ineffective in sentencing hearing for involuntary manslaughter); Stone v. State, 751 S.W.2d 579, 582 (Tex. App. -- Houston [1st Dist.] 1988, rev. ref'd) (following Cruz).

This acknowledgment of the duty to follow Strickland has not, however, produced a correct understanding of its requirements. Of particular relevance here, the error made below of placing the burden on the defendant to prove ineffectiveness of counsel by a preponderance of the evidence is frequently repeated in Texas. E.g., Moore v. State, 694 S.W.2d 528, 531 (Tex. Crim. App. 1985) ("[t]he

burden of proving ineffective counsel falls on the appellant. Such a contention must be proven by a preponderance of the evidence") (citations omitted); Applin v. State, 705 S.W.2d 411, 413 (Tex. App. -- Fort Worth 1986, no writ) ("[t]he burden of proving ineffective assistance of counsel falls on the appellant and such a contention must be proved by a preponderance of the evidence."); Ferguson v. State, 699 S.W.2d 381, 382 (Tex. App. -- Fort Worth 1985, rev. ref'd) (same); Grant v. State, 696 S.W.2d 74, 77 (Tex. App. -- Houston [1st Dist.] 1985, rev. ref'd); Parker v. State, 693 S.W.2d 640, 643 (Tex. App. -- Beaumont 1985, no writ), overruled on other grounds, Reed v. State, 744 S.W.2d 112 (Tex. Crim. App. 1988). In these cases, the courts, while citing Strickland and pursuing a two-part inquiry, show no

awareness that this Court required only a "reasonable probability" of prejudice to support relief. Instead, these Texas courts force the defendant to bear the more stringent "more likely than not" or "preponderance of the evidence" burden considered and rejected in Strickland itself.

The effects are particularly pernicious in cases like petitioner's, in which the reviewing court finds or is willing to assume that the deficiency prong has been met. In such cases, the invalid preponderance standard operates only on the prejudice inquiry, where this Court has specifically rejected it. In this case, the prejudice argument was hard-fought and close, and the imposition of an unnecessarily harsh burden of proof on the defendant led to the denial of a constitutionally valid claim. Moreover,

the Johnston appeals court is not alone in its confusion, as the other Texas cases cited above show.

The erroneous standard applied by the court below is coupled with a plainly erroneous ultimate result in this case. The trial evidence amounted to nothing more than a credibility contest between witnesses who claimed that petitioner "appeared" intoxicated and other witnesses who testified that she did not. Moreover, the symptoms on which the State's witnesses based their lay opinions of intoxication could at least as plausibly have been caused by petitioner's head injury. Despite the flimsy evidence of intoxication, the court below was willing to assume the conclusion of the contested issue at trial: "In the present case defense counsel was faced with the grim task of dealing with two

unbiased State's witnesses who had observed appellant's intoxication at the time of the offense." App., infra, 7a (emphasis added). It is small wonder that, having assumed intoxication, the court below then determined that counsel's errors had not been shown to be outcome determinative. Had the court correctly applied the Strickland standard to the evidence in this very close case, it would have had to reach the opposite result.

Instead, the court assumed the conclusion to the principal disputed issue at trial -- whether petitioner was intoxicated -- and made only the most cursory nod toward the prejudice prong of Strickland. Rather than recite the proper standard and review the evidence in detail, the court made only the facile and incorrect assertion that Radford's

testimony was "cumulative," followed by the unelaborated conclusion that prejudice had not been shown. App., infra, 8a. That is not a proper performance of the reviewing function under Strickland, and the result reached in this case was not the correct one.

The Court should grant certiorari both to correct a serious miscarriage of justice in this particular case, and to clarify a problem in the application of its Strickland test that is causing endemic confusion in the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1990

APPENDIX A

Affirmed and Opinion filed June 15, 1989.

THE STATE OF TEXAS

In The

Fourteenth Court of Appeals

No. C14-88-00873-CR

ANN JOHNSTON, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 449,279

OPINION

Appellant was convicted of involuntary manslaughter and sentenced by a jury to ten years' confinement in the Texas

Department of Corrections. On appeal, she alleges she was denied effective assistance of counsel. In addition, she alleges the trial court erred in allowing testimony to be bolstered. We affirm.

The facts reflect that on May 11, 1986, an automobile operated by appellant ran a red light and collided with another vehicle in an intersection. A passenger in the other vehicle died as a result of injuries sustained in the accident. After staying on the scene for some time, appellant left with an acquaintance prior to the time police arrived. Nothing in the record suggests appellant was tested for intoxication and the jury's finding of intoxication was apparently based solely upon the testimony of witnesses who observed her at the scene.

Two bystanders who stopped to render aid testified for the State. One of

them, who helped appellant out of her car and to a convenience store, testified to the following:

1. appellant asked for a cup of coffee before the police came because she was "f_____ up."

2. appellant smelled strongly of alcohol and her speech was slurred.

3. appellant's eyes were red and glassy.

In addition, both witnesses testified that, in their opinion, appellant was intoxicated based upon their observance of her.

In her first point of error appellant contends she was deprived of effective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments. In particular she complains of defense counsel's decision to call a private investigator to the stand in

order to impeach the testimony of the State's witnesses.

The record shows that the defense called Les Radford to the stand after the State's witnesses had testified. Radford had been hired by the defense to investigate the accident. In the course of his investigation, Radford interviewed the two bystanders who testified for the State. Prior to his being called as a witness, his report and its contents had not been used at trial.

Through Radford's testimony, defense counsel sought to uncover some minor inconsistencies between the witnesses' testimony at trial and their earlier statements to Radford. During his examination, Radford referred to notes from his investigation. Among the points brought out to impeach one witness were the following:

1. She had a mixed drink at her home prior to going to the bar that she was leaving when she witnessed the accident.

2. She arrived at the bar about 11:00, rather than 8:00 or 9:00 as she testified.

3. She had told Mr. Radford that, in her opinion, Ann Johnston was in the state of shock.

4. She had told Mr. Radford that in her opinion, Ann Johnston's speech was not slurred or mumbled.

As to the other witness, defense counsel sought to bring out the following:

> That Ann Johnston's speech was not slurred or that [the witness] would not know whether it was slurred because she never talked to her before.

After viewing the investigator's report, the prosecutor, on cross-examination, reviewed damaging evidence contained in the report that had already been testified to by the witnesses:

1. That she heard [appellant] ask [the other witness] to slap her

face in order to help her sober up before the police arrived.

2. That [appellant] said that she wanted a cup of coffee to sober up before the police arrived.

Appellant maintains that the value of the inconsistencies was inconsequential compared to the damaging effect of allowing the prosecutor to reiterate his case and calling the investigator amounted to ineffective assistance of counsel.

Texas follows the federal standard, enunciated in Strickland v. Washington, 466 U.S. 668 (1984), in deciding whether a defendant has received effective assistance of counsel. Wilkerson v. State, 726 S.W.2d 542, 548 (Tex. Crim. App. 1986). Under that standard, the defendant must establish two things: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. If either of the elements

is not established, the contention fails. Rico v. State, 707 S.W.2d 549, 556 (Tex. Crim. App. 1983). Moreover, a presumption exists in favor of counsel's conduct and a defendant has the burden of disproving "that, under the circumstances, the challenged action `might be considered sound trial strategy.'" Strickland v. Washington, 466 U.S. at 689.

In the present case defense counsel was faced with the grim task of dealing with two unbiased State's witnesses who had observed appellant's intoxication at the time of the offense. The defense strategy was to make light of discrepancy between the witnesses' statements at trial and their statements shortly after the accident. In hindsight it appears that the impeachment points made on direct examination of the investigator were

outweighed by the prosecutor's review of damaging testimony on cross-examination. However, the damaging statements brought out by the State were cumulative of the testimony already given. The prior testimony of the witnesses was the same as what they had told the defense investigator after the accident with a few exceptions brought out by the defense. Even if calling the investigator and opening the floor to a rehash of the evidence was error, there is no basis for speculating that the jury would have returned a verdict of not guilty had defense counsel chosen not to try to impeach the witnesses' testimony. We overrule appellant's first point of error.

In her second point of error, appellant contends she was deprived of effective assistance of counsel in violation

of Article 1, Section 10 of the Texas Constitution. Under this point of error, she again complains of her counsel's decision to call the private investigator to the stand and his failure to object to the prosecutor's subsequent cross-examination of the investigator. In addition she alleges defense counsel committed the following errors:

1. failing to preserve error when the prosecutor asked a defense witness if he was being paid for his services;

2. calling appellant's sister to the stand which allowed the prosecutor to uncover the fact that appellant had been drinking earlier;

3. failing at sentencing to emphasize the effect of a felony conviction on an attorney and;

4. failing to properly prepare a defense expert.

We hold that the matters complained of are either matters of disagreement with a reasonably sound trial strategy or

minor failures of speculative significance. Further, the adequacy of an attorney's services must be gauged by the totality of the representation afforded the accused. Carr v. State, 694 S.W.2d 123 (Tex. App.--Houston [14th Dist.] 1985). We have reviewed the record and find that numerous pretrial motions were filed, numerous objections were made at trial, questions of admissibility were fought vigorously, eloquent arguments were made and a well-coordinated, thoroughly prepared defense was presented. Accordingly, appellant's second point of error is overruled.

In her third point of error, appellant alleges the trial court erred in allowing the prosecutor to bolster testimony of his fact witnesses by using their prior statement made to the defense investigator. As previously discussed, the

defense opened the door to the investigator's report in its attempt to impeach the State's witnesses. Once that door was opened, it was within the trial court's discretion to allow the prosecutor to cross-examination the investigator on the report, even if some of the evidence had previously been brought out by the State on direct examination of the witnesses. Accordingly, we overrule appellant's third point of error.

The judgment is affirmed.

/s/Bill Cannon
Justice

Judgment rendered and Opinion filed June 15, 1989.

Panel Consists of Justices Pressler, Cannon and Ellis.

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APPENDIX B
COURT OF CRIMINAL APPEALS OF TEXAS
--- CASE SUMMARY ---

PDR/Case Number: 1170-89
Petitioner: APPELLANT
Record Filed: 08-18-89

Style: Johnston, Ann R.

Offense: Involuntary Manslaughter

Punishment: 10 Years
Writ Number:

Trial Court ID Number: 321010263
County: HARRIS
Trial Court: 263RD DISTRICT COURT
Trial Court Case Number: 449279
Trial Court Judge: Allen L. Stilley
Court Reporter:

Court of Appeals Case: 14-88-00873-CR
COA Opinion Aff 6-15-89

Contents: Tr, SF, Brief, S. Brief, AMFR

Companion Cases:

Remarks:

Persons Associated with this Case:

	PARTY	PERSON CODE	BAR/CODE NUMBER	LAST NAME
1.	APP	ATT	002187000	Berg
2.	APP	ATT	006210500	Duncan
3.	STA	DAT	421010000	Holmes
4.	DCT	CRT	101010263	Judge Presiding
5.	COA	CLK	220000014	Smart
6.				
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	RECV NOTICE	DATE OFF: mm dd yy
1.	Y	
2.	Y	
3.	Y	
4.	Y	
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PDR/Case Number: 1170-89 --- EVENT SUMMARY ---

Style: Johnston, Ann R.

EVENT NO.	EVENT-DATE mm dd yy	POST-PROCDG	EVENT
001	08-18-89		PDR FILED
002	09-19-89		NO RESPONSE FILED
003	09-27-89		WORKUP COMPLETE
004	10-25-89		PDR DISP
005	11-09-89		REHEAR FILED
006	11-16-89		WORKUP REH COMPLET
007	11-29-89		REHEAR DISP
008	11-29-89		FINAL DISP/REHEAR

DESCR	SEQ NO.	DISPOS	NOTIFIED mm dd yy
APP			08-18-89
STA			
APP			
APP		REFUSED	10-25-89
APP			11-09-89
APP		DENIED	11-29-89
APP		REFUSED	11-29-89

EVENT NO.	CALNDR	-DATE SET- mm dd yy	...ORAL REASON SET	ARC
001	RESPON	09-18-89	STA RESP DUE	
002	WORKUP	09-19-89	ATT WORKUP	
003	WORKUP	09-27-89	JUD REVIEW	
004	STATUS	11-09-89	REHEAR DUE	
005	MOTION	11-16-89	WORKUP REH	
006	MOTION	11-16-89	JUD REV REH	
007	STATUS	11-30-89	TO BE RETURN	
008	STORED	11-30-89	RETURNED COA	

Remarks:

LOC	DISP CD	REMARKS
CLK		
BGS		
CFC		
CLK		
BGS		
CFC		
CLK		
COA	Y	

Remarks:

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Opin/Disp Record for Event Number: 008
Disposition without Written Opinion: Y

11-29-89
Case Number:
1170-89

Author of Majority Opinion: (Initials)
Original:
Granting Rehearing:
Opinions Concurring:
Opinions Dissenting:
Opinions Concurring and Dissenting:
Not Participation:
Not Participation:
Per Curiam: Published:

Denying RehearingOther:

West Publishing Cite:
=== is this the FINAL RULING in the Case?: Y ===